No. 15073

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DESSER, RAU & HOFFMAN and JACK L. RAU, Individually,

Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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To the Honorable Judges Orr, Lemmon and Chambers, Judges of United States Court of Appeals for the Ninth Circuit:

Appellants, Desser, Rau & Hoffman and Jack L. Rau, individually, respectfully present this, their Petition for Rehearing, in the above entitled appeal, and in support of said petition hereby state the following grounds.

This Court held that to claim the right of set-off, the claimant must possess some beneficial interest in the fund or property against which the set-off is asserted. In so holding, it is believed the Court was in error.

Under the decisions, the only interest required is the right to set off or counterclaim itself, on the basis that each party owes or is indebted or otherwise obligated to, the other. This is what is meant by the words "mutual debts or mutual credits" as used in Section 68(a) of the Bankruptcy Act, according to all of the decisions. There seems to be no case requiring the presence of a particular and definable interest, beneficial or otherwise, in the fund or property against which the set-off is claimed.

Had bankruptcy not intervened and the purposes of the trust been completed, leaving a balance, the claim of the depositor of the fund for its return, certainly could be reduced by taking into consideration, in the accounting by the holder of the fund, the amount due to such holder from the depositor. Bankruptcy does not change the fundamental right to arrive at the true balance actually existing. And there is not a case which so holds. There would seem to be no justification either in the language of Section 68(a) or in precedent for the following language of the Court (pp. 3 to 4 of the opinion), "But we do think that where it (set-off) is allowed against property in the creditor's hands, the creditor must already have some beneficial interest of his own in or against the subject property, at least an equitable lien." It was to explain the position of the courts in the ordinary case of set-off and counterclaim that the Rules of Civil Procedure were discussed. These Rules do not, nor does any decision thereunder, require that the set-off claimant possess some interest of his own in the subject matter. It is believed that bankruptcy provides no exception to fundamental doctrines of set-off and counterclaim.

The reasoning of the Court that some independent and specific lien or right of the counterclaimant must exist, does not meet appellants' position. The very words of Section 68(a) in referring to mutual debts or credits, eliminates such a result. Indeed, the requirement of a beneficial interest in the party claiming set-off does violence to fundamental rules appertaining to the right of set-off or counterclaim. Each claim is separate and stands upon its own foundation.

The case of *Western Tie and Timber Co. v. Brown,* 196 U. S. 502, contrary to this Court's evaluation of that decision, is not predicated upon the circumstance that a fiduciary relationship existed, or upon the fact that a beneficial interest was or was not present in the set-off claimant, but, rather, upon a long established course of dealing which determined what was, in effect, a particular contractual relationship. The Court's attention is respectfully called to the language from the Opinion quoted at page 12 of appellants' reply brief, where the Supreme Court said that it thought that the findings established that Harrison, the bankrupt, sold goods, not to the Tie company, but to the laborers, and that, therefore, the result was to create an indebtedness for the price thereof, between Harrison and the employees alone. The Supreme Court went on to say,

> "We think, also, that the facts found establish *that the course of dealing* between Harrison and the tie company concerning the deductions from the payrolls was *that the Tie company, when it made the deductions, was under an obligation to remit the money collected from the laborers for account of Harrison, irrespective of any debt which he might owe the company.*" (Italics supplied.)

It is believed, furthermore, that the Court did not give adequate consideration to such cases as *In re Field Heating and Ventilating Co.,* 201 F. 2d 316, where the Court said that,

> "The yardstick for the determination of the right of set-off in bankruptcy is whether the debts are mutual, that is, whether each owes the other, and if such reciprocal demand exists, one may be set off against the other, no matter whether insolvency is present or whether set-off is made before or after bankruptcy intervenes, . . ." (Appellants' Original Brief, p. 21.)

The Court is respectfully requested to reconsider the other authorities discussed in this connection in appellants' opening brief at pages 19 to 23, inclusive.

The position of the Court that there is no attorney's lien under the law of California and that this distinguishes the instant case from the decision of this Court in *Half Moon Fruit and Produce Co. v. Floyd,* 60 F. 2d 799, is, it is respectfully submitted, incorrect.

In the first place, appellants are not claiming for services rendered or, indeed, for out-of-pocket expenses for the particular reason that the amount claimed was advanced as the bankrupt's attorneys. They are not claiming on the basis of any kind of lien. They simply expended their own funds, which, under any circumstances, constituted a debt of the bankrupt no matter in what capacity the amount was advanced. Had the bankrupt possessed a balance in its commercial bank account and had borrowed from the bank the amount necessary to finance the expense of its attorneys, certainly the bank, on the closing of the account, could set off, in its accounting,

the amount owed, without possessing a specific beneficial interest in the fund.

In the *Half Moon* case, the commission merchant *was held to have lost his lien.* This Court, in discussing Section 68(a) of the Bankruptcy Act, said that it was a provision borrowed from the English Bankruptcy Act which asserts,

> "a broader right of set-off than is usual because of the broad significance given to the phrase 'mutual credits.'"

Quoting from *Murray v. Riggs,* 15 Johns. (N. Y.), this Court, in the *Half Moon* case said that in dealing with the question of set-off in bankruptcy cases,

> ". . . mutual credit was not confined to pecuniary demands, but extended to all cases where the creditor had goods in his hands of the debtor and which could not be got at without an action at law or bill in equity."

This Court was not concerned, fundamentally, with the presence of an independent lien or right possessed by the counterclaiming commission merchant. (Please see Original Brief of Appellants, p. 19.)

To require as a condition precedent to the right to assert a set-off or counterclaim that the claimant must possess "some beneficial interest of his own in or against the subject property" would be to add an element to Section 68(a) of the Bankruptcy Act not contemplated by the provision itself, and not justified by judicial interpolation, at least so far as existing precedent is concerned.

It is to be noted that the specific purpose of the trust had ended. No further payments out of this special ac-

count were required or could be made on behalf of the bankrupt. The trustee's dutys, to use the fund in payment of the bankrupt's obligations were terminated by bankruptcy. All that remained was to return the existing balance to the general assets of the bankrupt. Please see, in this connection, appellants' original brief at page 24.

Conclusion.

It is earnestly urged that there is nothing in the specific language of Section 68(a), nothing in legislative policy, and nothing in the decisions which prevents a scrupulous and faithful trustee from asserting the right of set-off for a collateral debt. According to the decisions cited by Collier on Bankruptcy, and the conclusion drawn therefrom by the author, if the possession of funds or property belonging to the bankrupt was wrongful, a claim against the bankrupt cannot be set off against the bankrupt's debt, but if such possession was obtained lawfully, and with the bankrupt's consent, the claims are, mutual and subject to set-off. Please refer to appellants' reply brief, pages 7 to 11, inclusive, particularly to page 8.

It is, therefore, respectfully prayed that a rehearing be granted.

Desser & Hoffman,
David R. Nisall,
Jack L. Rau,
By David R. Nisall,
Attorneys for Appellants.

Certificate.

I, David R. Nisall, one of counsel for the appellants, in the above entitled appeal, hereby certify that in my judgment, and in the judgment of all other counsel for appellants, the petition for rehearing is well founded and that it is not interposed for purposes of delay.

David R. Nisall,